UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAESARS ENTERTAINMENT CORPORATION
d/b/a RIO ALL-SUITES HOTEL AND CASINO,

and **Case 28-CA-060841**

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, LOCAL 159, AFL-CIO

AMICUS BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY

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INTEREST OF *AMICUS CURIAE*

The Council on Labor Law Equality ("COLLE") is a trade association founded 35 years ago to monitor and comment on developments in the interpretation of the National Labor Relations Act ("NLRA" or "Act"). Through the filing of amicus briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation of national labor policies. COLLE is the nation's only brief-writing association devoted exclusively to issues arising under the NLRA, and in recent decades has filed briefs in nearly every significant labor case before the National Labor Relations Board ("NLRB" or "Board"), the federal appellate courts, and the United States Supreme Court.

COLLE represents employers in virtually every business sector, all of whom are subject to the NLRA. COLLE members have policies regarding employee access to email systems or other electronic communication devices for business purposes, and COLLE's members have a vital interest in how the NLRA is interpreted and applied in the context of technology and use of employer-provided email and computer systems. The specifics of these policies vary, but, prior to the Board's decision in *Purple Communications, Inc*., 361 NLRB 1050 (2014), many allowed limited personal use of company systems while prohibiting specific categories of communication, such as e-mails over a certain size or to more than a specified number of recipients, and e-mails including solicitations on behalf of outside groups or organizations. To ensure compliance, many employers forewarned employees the employer may monitor communications on employer-provided, company-owned equipment.

These policies regarding employee usage of business e-mail systems serve critical business needs for COLLE member companies. They help curtail commercial solicitations and

solicitations for social, political, or religious organizations, which could distract employees from their work during working time and dominate space on e-mail systems, slowing down and crowding out legitimate business e-mails. They limit the risk of liability and embarrassment to employers and employees due to transmission of inappropriate messages or confidential information from company e-mail accounts, such as has been widely reported in the press regarding disclosure of private personal identifiers and company financial information. Also, the policies help control the risk of illegal copyright infringement, and disclosure and misuse of private company information, such as trade secrets, business finances and lists of customers/suppliers/distributors. Such policies are designed to prevent file-downloading of confidential business information using company computers and dissemination by e-mail. They prevent non-business e-mail traffic from reducing network speeds, wasting computer memory, and forcing employees to sort through spam clogging their e-mail. They prevent transmission of material that could be construed as sexual harassment, discrimination, or defamation, or that violate, for example, the privacy regulations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). They prevent the introduction of computer viruses and other security threats onto company networks. All of these are legitimate, nondiscriminatory reasons to maintain restrictions on employee's personal use of business-provided e-mail systems at work.

COLLE members have a growing interest in the Board's regulation of e-mail policies given that global restrictions on personal use of business e-mail and other electronic communication systems are designed to help protect multinational companies, their customers and employees from potential violations of international data privacy laws. Just as electronic communication has changed over the past 20 years, so too have legal and practical concerns

about e-mails and other business-provided systems that would run afoul of both national and global standards and regulations. For example, COLLE member companies face a huge risk and significant penalties for violations of foreign data privacy laws in virtually every country, and global standards with extraterritorial application, such as the "European Union Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data."[1] Data privacy might be breached by personal use of business e-mail systems at work. Thus, allowing unfettered use of e-mails by employees on company-provided systems for non-business purposes also implicates the foreign data privacy laws, potentially exposing U.S. employers to liability.

The communication policies of *amicus* COLLE and its member companies are designed to safeguard company property and serve legitimate proprietary business needs, as well as protect the privacy interests of customers and employees. Those legitimate needs cannot be achieved without restrictions on non-business use of company-owned and provided e-mail systems by employees on working time. COLLE members thus have a strong interest in the proper resolution of this case, which presents fundamental issues regarding employers' private property rights and the right to control e-mail technology they purchase and maintain for business purposes.

STATEMENT OF THE CASE

On May 3, 2016, ALJ Mara-Louise Anzalone issued her decision finding Caesars Entertainment Corporation ("Caesars") violated Section 8(a)(1) "by maintaining an overly broad computer usage policy that effectively prohibits employees' use of [its] email system to engage in Section 7 communications during nonworking time." JD (SF)-20-16 at p. 9.

[1] J. EU Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data, 1995 O.J. L 281.

In its exceptions to the ALJ's decision in *Caesars*, the Respondent asks the Board to overrule *Purple Communications* and return to the holding of *Register Guard*, 351 NLRB 1110 (2007), *enf'd. in part and remanded sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), that employees do not have a statutory right to use their employers' email system for Section 7 activity.

On August 1, 2018, the Board issued its Notice and Invitation to File Briefs setting forth the following four questions for the parties and interested *amici* to aid it:

1. Should the Board adhere to, modify, or overrule *Purple Communications*?

2. If you believe the Board should overrule *Purple Communications*, what standard should the Board adopt in its stead? Should the Board return to the holding of *Register Guard* or adopt some other standard?

3. If the Board were to return to the holding of *Register Guard*, should it carve out exceptions for circumstances that limit employees' ability to communicate with each other through means other than their employer's email system (e.g., a scattered workforce, facilities located in areas that lack broadband access)? If so, should the Board specify such circumstances in advance or leave them to be determined on a case-by-case basis?

4. The policy at issue in this case applies to employees' use of the Respondent's "[c]omputer resources." Until now, the Board has limited its holdings to employer email systems. Should the Board apply a different standard to the use of computer resources other than email? If so, what should that standard be? Or should it apply whatever standard the Board adopts for the use of employer email systems to other types of electronic communications (e.g., instant messages, texts, posting on social media) when made by employees using employer-owned equipment?

INTRODUCTION

The policy issues at stake go well beyond the Section 7 rights of employees. They involve cutting edge communication technology – not only email, but the entire universe of electronic communications – and include significant risks to fundamental business and economic policy, in addition to critical property rights.

A top priority for all businesses is to protect customer relationships. Businesses invest significantly in technology that not only provides value to customers but also protects them from fraud and data theft. New technologies are evolving rapidly, yet sophisticated criminals are able to pose serious threats against businesses at a staggering rate. According to a Verizon report, retailers account for about one quarter of data breach incidents while financial institutions account for more than a third; and U.S. government agencies ranging from the Army to the IRS see more than 60 breach incidents a day, according to the Government Accountability Office. *See also* "Unity Point warns 1.4 million patients their information might have been breached by email hackers" (Des Moines Register, July 30, 2018).

Introduction of a data breach facilitated by either an employee or an outside group unintentionally or deliberately introducing a virus or other outside content into a company's computer system could compromise not only personal data of associates, but also payment or personal data of millions of customers. As noted in the article, "Retailers and banks were on the hook for more than $11 billion in global card fraud in 2012, a 15 percent increase from the previous year." And, hackers installed malware in Target's security and payments system. As a result, "40 million credit card numbers—and 70 million addresses, phone numbers, and other pieces of personal information—gushed out of its mainframes." *See*, BloombergBusinessweek: Jordan Robertson, "Why So Many Retail Stores Get Hacked for Credit Card Data" (http://www.businessweek.com/ articles/2014-03-20/ credit-card-data-security-standards-dont-guarantee-security); "Dixons Carphone data breach: Number of victims rises from 1.2m to 10m" (zdnet.com, July 31, 2018).

Many COLLE members are certified for their data security standards by the Payment Card Initiative (PCI). Allowing an outside group access to employer e-mail would likely

compromise the PCI certification causing the COLLE member exposure to additional charges and legal responsibility in the event of a breach. “The retail industry is the top target of cyber criminals due to the lure of the large number of customer records, with 96% of the data targeted coming from payment card data, personal identifiable info (PII), e-mail addresses and a well-established underground market place for this stolen information.” *See*, “Trustwave 2013 Global Security Report” (https://wvvw2.trustwave.com/2013GSR.html).

In their Dissent in *Register Guard,* Board Members Liebman and Walsh asserted the NLRB had become the "Rip Van Winkle" of administrative agencies by ignoring the prevalence of e-mail in society and at work, which in their opinion made employers’ e-mail systems akin to a “gathering place” for employees like the “water cooler.” *Register Guard*, *supra* at 1121.

But it was the Board in *Purple Communications* that showed itself to be the Rip Van Winkle of administrative agencies by ignoring the complexities of current industrial life as well as accessibility and wide use by employees’ of other forms of electronic communications. All of the angst about denying employees use of company e-mails for purposes of solicitation is outdated. There are many other alternative and more appropriate means of communication available for employees to exercise their Section 7 rights outside of working time. As member Johnson stated as his dissent in *Purple Communications*:

> My colleagues accuse the *Register Guard* majority of being Rip Van Winkle. But, in ignoring all the changes in social media since *Register Guard*, we need to ask who is the Rip Van Winkle here. … The Board should get with the present, and concern itself with protecting Section 7 rights on that new [technological] frontier. It should not be burning up government resources and its claim to institutional deference by refighting a war over terrain that indisputably no longer matters today to Section 7… .

Purple Communications, 361 NLRB at 1110.

Access to the employer's e-mail system is outdated and unnecessary in view of widespread use of other available means of communication within and outside the workplace.

ARGUMENT

A. *Purple Communications* Erroneously Emphasizes Employee Section 7 Rights at the Expense of Employer Property Rights Contrary to the Supreme Court's Directives.

In 1937, the Supreme Court held the Act was constitutional because "instead of being an invasion of the constitutional rights of either [employers or employees, the Act] was based on the recognition of the rights of both." *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 34 (1937) (quoting *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548, 570 (1930)). The Supreme Court has emphasized the balance of employer property rights and Section 7 rights "must be obtained with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

Accordingly, the Board consistently has held employees do not possess a right to use employer-owned communication equipment, other than email systems, for Section 7 purposes. Such property includes bulletin boards,[2] public address systems,[3]televisions,[4]and copy machines. *Champion Int'l Corp.*, 303 NLRB 102, 109 (1991) (employer possesses "a basic right to regulate and restrict use of [copy machine]"). And, in *Churchill's Supermarkets*, the Board ruled, "an employer ha[s] every right to restrict the use of company telephones to business-related conversations." 285 NLRB 138, 155 (1987) *enf'd*. 857 F.2d 1474 (6th Cir. 1988).

Notwithstanding this long line of authority, the Board in *Purple Communications* decided email systems should not be treated as company communication equipment. Instead, the

[2] *Eaton Techs.*, 322 NLRB 848, 853 (1997) ("It is well established that there is no statutory right of employees or a union to use an employer's bulletin board.").
[3] *Heath Co*., 196 NLRB 134 (1972) (Refusal to allow pro-union employees to respond to anti-union broadcast did not interfere with the conduct of a free and fair election).
[4] *Mid-Mountain Foods, Inc*., 332 NLRB 229, 230 (2000) (Finding no statutory right to use breakroom television to show pro-union video), *enf'd*. to 269 F.3d 1075 (D.C. Cir. 2001).

Board equated email systems to a "natural gathering place" akin to the modern day "water cooler." By doing so, however, the Board violated the Supreme Court's directive to balance employer property rights and Section 7 rights with as little destruction of one as necessary to maintain the other, because it failed to (1) acknowledge employers' legitimate interests in restricting the use of company-provided email, e.g., not to clog up server space, to avoid risks of computer hacking, viruses, data breach, dissemination of confidential or trade secret information, or inappropriate emails; or (2) consider alternative means of employee communications – other ways employees could exercise their Section 7 rights.

The Board in *Register Guard* got it right. Under well-established Board law, company-owned property is for work, not for personal solicitations or other personal use. *Register Guard,* 351 NLRB at 1116. An employer's communications system "including its email system, is [the employer's] property and [is] purchased by the [employer] for use in operating its business." *Register Guard,* 351 NLRB at 1114. Employers have legitimate interests in maintaining the efficient operation of their e-mail systems and have valid concerns about preserving server space, protecting against computer viruses, hacking, and data privacy, dissemination of confidential information, and avoiding company liability for inappropriate e-mails.

The employer's e-mail system, like other equipment an employer purchases to operate its business more effectively and efficiently, is for business purposes. It is part and parcel of the employer's private property. The e-mail system is comprised of hardware (e.g. a computer monitor, keyboard, modem, server, and other parts) that is like other business equipment — not the "water cooler." It is also comprised of software used, for example, to implement filters for more efficiently handling and organizing messages and e-mail folders for creating, sending, receiving and organizing electronic mail. The hardware and software that comprise the e-mail

system are costly and, therefore, are even more valuable, tangible property than employer bulletin boards, fax machines, telephones, etc., all of which the Board has long held as not lawfully subject to employee use for non-business purposes. Unlike face-to-face water cooler communications, the employer's email system is a place for work. "To the extent that it is a tool of communication, it is the employer's tool purchased, designed, and operated by the employer to further the employer's business purpose." *Purple Communications*, 361 NLRB at 1083 (Member Johnson, dissenting).

The Supreme Court has long recognized, "[t]he responsibility to adapt [the NLRA] to changing patterns of industrial life is entrusted to the Board." *NLRB v. J. Weingarten, Inc.* 420 U.S. 251, 266 (1975). But that responsibility cannot take precedence over the more fundamental obligation of the Board to do as little damage to employer property rights as required to maintain Section 7 rights. *Babcock & Wilcox*, 351 U.S. at 112. The majority in *Purple Communications* emphasized the ubiquitous nature of e-mails as part of "changing patterns of industrial life," but it failed to consider the "changing patterns of industrial life" justify employer policies and practices granting employees a degree of limited autonomy, allowing them the practical, common-sense usage of company property for limited personal reasons, while also restricting of e-mail that may be damaging to the business. *See, Weingarten, Inc., supra* at 266 (quoting *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963)).

In addition, the "changing patterns of industrial life" include multiple other methods of electronic communication and widely-owned personal electronic devices. The Board's failure to consider these alternative means of communication is contrary to decisions of the Supreme Court and the Board. As commonplace as personal communication devices have become

throughout society, the property rights of employers should not be sacrificed to employees' use of company e-mail systems.

B. In Light of the Numerous Ways Employees Have to Exercise Their Section 7 Rights, the Board Should Not Infringe Employer Property Rights to Allow Employees to use Company Email for Protected Activity.

In *Purple Communications*, the Board refused to consider alternatives means employees have to exercise their Section 7 rights, arguing they are "relevant only with respect to nonemployees who seek access to an employer's property." *Purple Communications*, 361 NLRB at 1063. The Board based its refusal on a misreading of the Supreme Court's decisions in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), *Babcock & Wilcox, supra*, and *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The Supreme Court has never held alternative means of engaging in protected activities are not relevant to the balance of employer and employee interests. Justice Brennan stated in *Beth Israel Hospital* that "the availability of alternative means of communication is not, with respect to employee organizational activity, a *necessary* inquiry," *Beth Israel Hospital*, 437 U.S. at 505 (emphasis added), but he did not say it was an *improper* inquiry. Similarly, although *Babcock & Wilcox* and *Lechmere* involved non-employee access, the Supreme Court did not hold or suggest the consideration of alternative means was inapplicable or inappropriate in situations involving employees. The majority in *Purple Communications* acknowledged this, saying "no alternative means inquiry is *required* here." 361 NLRB at 1062 n. 62 (emphasis supplied).

And, in *Beth Israel Hospital*, upon which the majority relied heavily in *Purple Communications*, the Supreme Court conducted just such an analysis/balancing. The Court noted "only a fraction" of the employees "ha[d] access to many of the areas in which solicitation [was] permitted" and those areas were not "conducive" to the exercise of protected

rights. *Beth Israel Hosp*., 437 U.S. at 489, 505. In other words, because employee locker rooms provided insufficient opportunities for employees to exercise Section 7 rights, the Court upheld employee rights to engage in protected activities in the cafeteria. Justice Brennan explained:

> [It] cannot be said that, when the primary function and use of the [hospital] cafeteria, *the availability of alternative areas of the facility in which §7 rights effectively could be exercised*, and the remoteness of interference with patient care [i.e., operations] are considered, it was irrational [for the Board] to strike the balance in favor of §7 rights in the hospital cafeteria ….

437 U.S. at 506-07 (emphasis supplied).

To determine whether employer property rights must be diminished to ensure Section 7 rights, the Board must consider employees' alternative means to exercise Section 7 rights. As one commentator stated, "it is nonsensical to suggest that competing interests can be weighed without consideration of the alternatives." Harrison C. Kuntz, Crossed Wires: *Outdated Perceptions of Electronic Communications in the NLRB's Purple Communications Decision*, Washington Univ. L. Rev. Vol. 94; 511, 542 (2017); *see also Purple Communications*, 361 NLRB at 1101 ("First, the extant tests inherently invoke a consideration of alternatives…. [T]he longstanding Supreme Court balancing standard that we apply here is that the destruction of property rights be 'as little as is consistent with' the maintenance of Section 7 rights and vice versa. *Babcock & Wilcox*, 351 U.S. at 112. How can we possibly determine this 'least destructive means' for property rights and Section 7 rights without considering alternatives?") (Member Johnson, dissenting).

In his dissent in *Purple Communications*, member Johnson correctly stated the issue facing the Board:

> The question presented here is whether the [Act] requires an employer to surrender possession and control of *its own email network* so that employee communications about [protected] activities related to their employment, may be made as a matter of right across that network *at any time*, effectively including on *working time* paid for by the employer, even when (a) there are *multiple other*

> electronic communications networks that employees could use for such kinds of statements and discussions on their own time, … (b) employees *already possess* the right to solicit and engage in [protected] communications in the workplace on a face-to-face basis, and (c) the employer's email policy *does not discriminate* against such communications … .

Id. at 1077-78 (emphasis in original).

While the use of e-mail both at work and outside of work has grown dramatically in recent years, so too have other means of electronic communications employees use. For example, cell phone ownership has increased exponentially among U.S. adults from 53% in 2000 to 95% today. *See*, *Mobile Fact Sheet*, Pew Research Ctr. (July 12, 2018); "*The Web at 25 in the U.S., The Overall Verdict: The Internet has been a Plus for Society and an Especially Good Thing for Individual Users."* (Susannah Fox and Lee Rainie: Pew Research Center Report, February 27, 2014) (http://www.pewinternet.org/2014/02/27/the-web-at-25-in-the-u-s/). And, 77% of adults own smartphones now, up from just 35% in 2011. *Mobile Fact Sheet, supra*. Moreover, desktop or laptop computer access is no longer a prerequisite for internet or e-mail access, as "87% of all adults in the U.S. use the internet, e-mail, or access the internet via personal mobile device." *The Web at 25 in the U.S., supra*. Similarly, a majority of Americans use social media platforms Facebook (68%) and YouTube (73%). *Social Media Use in 2018*, Pew Research Ctr. (March 1, 2018). And, as member Miscimarra pointed out in his dissent in *Purple Communications*, employees utilized these other technological developments to pursue protected activities. 361 NLRB at 1071-72 and n. 37-38 (citing *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014) (employee used Facebook); *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 36 (2012) (same); *Laurus Tech. Inst.*, 360 NLRB No. 133 (2014) (employee used text messages); *Salon/Spa at Boro, Inc.*, 356 NLRB 444 (2010) (same)). Member Miscimarra correctly elaborated:

> [T]he constant expansion and refinement of social media services like Facebook, Twitter, YouTube, and Instagram, for example, have produced many features that account for their popularity, and that makes social media much more powerful and effective for coordinated group activities than single-purpose business email systems. In this regard, the use of mobile phones and similar personal devices – combined with social media – render coordinated activities virtually immune from suppression.

Id. at 1072 (Member Miscimarra quoted articles discussing the significant role social media had in the Arab Spring uprisings, notwithstanding government efforts to suppress social media use).

It may be quicker or more convenient for employees to communicate with their coworkers using the employer's email systems than by using social media or personal email, but convenience has never been a justification for an employer losing control over its property, and is not here a justification to allow employees to use the employer's email system. With easy access to ever-increasing communications technology, there simply is no need for employees to rely on the employer's computer equipment and e-mail system at work to communicate with one another about non-business related issues or to solicit for outside organizations during their work time or, using company property, even non-work time. Perhaps member Miscimarra said it best when he stated, "the Board cannot reasonably conclude… given the current state of electronic communications[,] that an employer-maintained email system devoted exclusively to business purposes constitutes an 'unreasonable impediment to self-organization.'" *Purple Communications*, 361 NLRB at 1077 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801 n. 6 (1945)).

C. *Purple Communications* is Unworkable, Its "Special Circumstances" Test Illusory, and it Conflicts with the Well-Established Maxim That Working Time is For Work.

The Board, with court approval, has long held "working time is for work." *Our Way, Inc.*, 268 NLRB 394 (1983) (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943)). The

term "working time" is critical because it "connotes periods when employees are performing actual job duties, periods which do not include the employee's own time such as lunch and break periods." *Id*. at 395. Hence, employer rules against, and discipline for, employees engaging in protected activities during working time are presumptively valid. *Id*. In fact, in the seminal *Republic Aviation* case upon which the majority purports to rely in *Purple Communications*, the Supreme Court confirmed that "[t]he Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work…." 324 U.S. at 803 n. 10 (quoting *Peyton Packing*, *supra*).

Although the Board in *Purple Communications* held employees had the right to use an employer's email system only during non-working time, absent employer continuous surveillance, there is no way to determine whether or not employees are sending emails regarding Section 7 activities on non-work time, as opposed to working time. And even assuming the employee sending the email is not on working time, the recipient may be on working time, or may only see or review the email during working time. Employers should not have to countenance this disruption of work, and it is in no one's interest for employers to monitor closely all employee emails to ensure employees are only using email for personal and protected communications during non-working time.

What is more, the Board's "special circumstances" exception to the newly-created Section 7 right for employee use of the employer's business e-mail system where it is necessary to maintain productivity and discipline is illusory. In *UPMC*, 362 NLRB No. 191 (2015), the Board found the hospital's interest in patient safety, including avoiding the distraction of its key healthcare providers, did not meet the special circumstances exception. If patient safety concerns

do not meet the standard, it is hard to imagine what could. In fact, in the nearly four years since *Purple Communications* issued, neither the Board, nor any ALJ, has found an employer to have met the "special circumstances" exception.

D. Employers Should Be Allowed to Impose Neutral Restrictions on Employee Use of Company Email and Other Communications Systems.

Employers should be free to impose neutral restrictions on use of company communications systems, including e-mail, so long as there is no discrimination against NLRA-protected communications. *NLRB v. Southwire Co.,* 801 F.2d 1252, 1256 (11th Cir. 1986) (finding a violation of the Act only "when the employer otherwise assents to employee access...and discriminatorily refuses to allow the posting of union notices or messages"); *See also, e.g., Guardian Indus. Corp. v. NLRB,* 49 F.3d 317, 318 (7th Cir. 1995)("We start from the proposition that employers may control activities that occur in the workplace, both as a matter of property rights... and of contract...."); *J.C. Penney Co., v. NLRB,* 123 F.3d 988, 997 (7th Cir. 1997) (holding that while "[a]n employer does not have to promote unions by giving them special access" to communications media, the employer "cannot discriminate against a union's organizational efforts"); *Union Carbide Corp. v. NLRB,* 714 F.2d 657, 663-64 (6th Cir. 1983) (employers have a "basic property right" to bar non-business use of employer-owned communications equipment such as telephones, bulletin boards, TV/VCRs, photocopiers — and e-mail). *See also, Mid-Mountain Foods, Inc.,* 332 NLRB 229, 230 (2000), *enf'd.,* 269 F.3d 1075 (D.C. Cir. 2001); *Media Gen. Operations, Inc.,* 346 NLRB 74, 76 (2005), *enf'd.,* 225 F.App'x 144, 148 (4th Cir. 2007) (use of e-mail).

Even where an employer grants limited exceptions to its e-mail policy, the Board and the courts historically (and correctly) upheld that limited use against charges of discrimination by unions that were denied access. That is, employers may allow some non-business e-mail without

opening the door to all non-business e-mail, including union-related e-mail. In *Restaurant Corp. of America v. NLRB,* 827 F.2d 799, 807 (D.C. Cir. 1987), an employer was held not to have discriminated in violation of the Act by allowing "spontaneous general social collections" during working time despite disciplining an employee for engaging in union solicitation. As the court explained, the "essence of discrimination" under the NLRA is "treating like cases differently." *Id.* at 807-808. Since the union solicitation differed from the spontaneous social solicitations the court found there was no discrimination under the Act.

Allowing limited exceptions to restrictions on personal e-mail use at work in the face of restrictions on personal use recognizes the practical realities of today's workplace and the complexities of industrial life by allowing individual employees a degree of personal autonomy to use e-mail for everyday exigencies, such as car pool arrangements, lunch or dinner plans or limited charitable solicitations without opening the floodgates of the system to mass solicitations internally and from outside groups that consume substantial network resources and clog the system for legitimate business use.

E. *Purple Communications* Raises Constitutional "Compelled Speech" Issues Under The First Amendment.

Union solicitations on employer-owned and employer-provided e-mail equipment also raise a serious question concerning compelled speech under the First Amendment, since it could imply company support for those messages or, in effect, require the company to allow the use of its own equipment to advance views for union purposes with which it disagrees. *See, e.g., Boy Scouts of Am. V. Dale,* 530 U.S. 640, 647-48 (2000); *Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S.* 557, 573-74 (1995); *Consol. Edison Co. v. Pub. Serv. Comm'n,* 447 U.S. 530, 544 (1980). As the D.C. Circuit stated in *National Association of Manufacturers v. NLRB,* 717 F. 3d 947 (D.C. Cir. 2013), the required posting of a notice explaining how to form

or join a union, when an employer opposes unionization, would violate the First Amendment freedom of speech, which "includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 957 (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Or as the Supreme Court stated in *United States v. United Foods, Inc.*, 533 U.S. 405, (2001): "Just as the First Amendment may prevent government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views…"; See also, *Johanns v. Livestock Mktg. Ass'n,* 544 U.S. 550 (2005) (Thomas, J., concurring); *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1211 (D.C.Cir. 2012). Further, as the Court said in *Rumsfeld v. Academic & Institutional Rights,* 547 U.S. 47, 63 (2006), compelled speech cases include not only situations in which an organization is compelled to speak against its will, but also where one must "host or accommodate another speaker's message."

F. The Board Need Not Establish Prospective Exceptions To Its *Register Guard* Holding.

Returning to the Board's *Register Guard* holding will reinstate the balance between employees' Section 7 rights and employers' property rights while also respecting employers' First Amendment free speech rights. Moreover, just as the "changing patterns" and "complexities of industrial life" justify a return to the reasoning behind the Board's *Register Guard* holding, they similarly make it unnecessary for the Board to carve out prospective exceptions to its *Register Guard* standard.

Any suggestion that employees are without means to communicate with each other about matters affecting their workplaces is refuted by the data. Countless studies confirm we are living in the most technologically "connected" society in history, and there is every indication this trend will continue. For example, a recent study estimated there were nearly 264 million smartphones in use in the United States in 2017, with users collectively looking at their smartphones roughly

12 billion times per day! "Deloitte 2017 Global Mobile Consumer Survey: US edition, The Dawn of The Next Mobile Era" (https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2017-global-mobile-consumer-survey-executive-summary.pdf). The Wi-Fi specialist iPass estimates Wi-Fi hotspot availability in the United States has grown by 6,177% over the past five years. *See*, "iPass Wi-Fi Growth Map" (https://www.ipass.com/wifi-growth-map). And, the statistics portal Statista predicts the number of public Wi-Fi hotspots worldwide will double to 542 million over the next three years. *See*, "Global public Wi-Fi hotspots 2016-2021" (https://www.statista.com/statistics/677108/global-public-wi-fi-hotspots). Quite simply, we are more connected than ever.

The ubiquity of smart devices (smartphones, tablets, smart watches, etc.), the proliferation of broadband network access, and the pervasiveness of social media and personal email make it nearly impossible to imagine "circumstances that [might] limit employees' ability to communicate with each other"[5] such that the compelled use of an employer's communications systems for Section 7 activity would become necessary. The data suggests precisely the opposite. Accordingly, the Board should evaluate any such claims in the future on a case-by-case basis.

G. The Board's *Register Guard* Holding Should Apply To All Employer-Owned Communications Systems.

Finally, although *Register Guard* was limited to employer email systems, the reasoning is consistent with the Board's long line of employer property rights cases discussed above, which have found repeatedly that employees have no statutory right to use employer-owned communications equipment to exercise Section 7 rights. No valid argument can be made that an employer has less of an interest in controlling the use of its other communications systems than

[5] Board Notice and Invitation to File Briefs, question 3.

it does in controlling the use of its email systems, and there is no meaningful difference that would alter the analysis or warrant a rule different from the general rule established in *Register Guard*. Balancing Section 7 rights against employer property rights as directed by the Supreme Court, particularly in light of the connectedness of our society and the availability of multiple and often *better* means for employee communication, weighs in favor of applying *Register Guard* to all employer-owned communications equipment.

CONCLUSION

For the foregoing reasons, COLLE urges the Board overturn *Purple Communications* and return to the holding of *Register Guard.* Authorizing employee access to the employer's business e-mail system as a Section 7 right at work to solicit for unionization or other non-business activities violates an employer's property rights and is unnecessary to protect employees' Section 7 rights.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this date, October 5, 2018, a true and correct copy of the foregoing Brief of Amicus Curiae was filed via the NLRB's e-filing system and was served upon the following by e-mail:

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